Petition

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No. 81-1617

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. PLACE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether an air traveler's Fourth Amendment rights are violated when he is stopped for questioning by law enforcement authorities, whose initial feelings of suspicion exist solely because of certain profile characteristics exhibited by the air traveler.

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v.

RAYMOND J. PLACE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES D. CLARK, Attorney at Law, on behalf of Raymond J. Place, Cross-Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (App. D, *infra*, 34a-57a) is reported at 498 F.Supp. 1217.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 30a-31a), was entered on September 16, 1981. A petition for rehearing was denied on November 30, 1981 (App. C, *infra*, 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (App. E, *infra*, 58a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 19.5 of the Rules of the Supreme Court.

STATEMENT

A. Summary of Facts Incident to the Seizure of Raymond Place at Miami International Airport

On August 17, 1979, Robertson McGavock, an officer of the Dade County Public Safety Department in Miami, Florida, was on assignment at Miami International Airport. (Tr. 8)[1] Officer McGavock was regularly assigned to Miami International Airport as a narcotics investigator. In an attempt to detect narcotics movement, Officer McGavock's duties included observing passenger movement on inbound and outbound airline flights. The National Airlines ticket counter was the site Officer McGavock

[1] "Tr." refers to the transcript of the suppression hearing

selected to observe departing passengers on this date and it was at this site where he first observed the Defendant, Raymond Place. (Tr. 8-9)

Officer McGavock was positioned in the line formed by unticketed passengers when Raymond Place took up a position immediately behind him in the queue. (Tr. 8-12) Although Officer McGavock had never seen or heard of Mr. Place and even though he had no information "as to anything regarding any subject" relating to Raymond Place, he directed his attention to Mr. Place when it appeared to him that Mr. Place was "scanning" the lobby area. (Tr. 10 & 64) After standing in line in front of Mr. Place for approximately five minutes, Officer McGavock left the ticket line and joined John Facchiano, one of the three other law enforcement officers comprising the team of which Robertson McGavock was a member this day. (Tr. 11) Once Officer McGavock left the ticket line he continued to observe Mr. Place from several locations until Mr. Place completed the purchase of his ticket. While Raymond Place was actually transacting his business with the airline ticket agent, Officer McGavock saw Mr. Place check two suitcases with name tags, purchase a ticket, and accept a ticket folder from the ticket agent with luggage claim stubs attached. Officer McGavock also watched the ticket agent indicate to Mr. Place the direction of concourse "F", the concourse utilized by National Airlines for its flights. (Tr. 11-14)

Once Raymond Place moved from the ticket counter area toward concourse "F", Officer McGavock moved to a position paralleling the baggage conveyor belt transporting Mr. Place's two checked suitcases. From this vantage point, Officer McGavock observed the suitcases and noted the baggage claim stubs indicated

a destination of La Guardia International Airport. (Tr. 14-15) Once the two suitcases moved out of sight, Officer McGavock directed his team member, Officer Facchiano, to go to the baggage loading area to look at the name tags on the two suitcases and determine what information they provided. Meanwhile, Officer McGavock continued to observe Mr. Place and watched him perform what the trial court identified as a "curious ballet." When Officer Facchiano returned from the baggage area he told McGavock the name on the suitcases was "Place . . . P-L-A-C-E." (Tr. 16-18) At this juncture, personal contact was made with Mr. Place as he waited his turn to pass through the departing passengers security gate for concourse "F". Officer McGavock admitted that at this point he had no knowledge of the Defendant being "involved in anything" and that contact was initiated because he *just had a feeling.* (Tr. 35) This feeling was based upon his observance of two "unusual" activities — "scanning the lobby and looking over his shoulder for an unusual length of time while walking through the lobby for a great distance." (Tr. 32)

Officer Facchiano made the first contact with Mr. Place while Robertson McGavock stationed himself approximately 20 feet away. Prior to joining Officer Facchiano, McGavock watched Facchiano produce and show his credentials to Mr. Place. (Tr. 19) Officer McGavock then joined them as they moved to a position out of the line for departing passengers. (Tr. 19) The personal contact with Mr. Place was for the purpose of conducting a "brief interview . . . to alleviate any of that suspicion we might have had." (Tr. 35) For the next several minutes, the officers asked Mr. Place his name and had him produce and hand over his airline ticket and his drivers license. (Tr. 36) The name given by Mr. Place, the name

on the two suitcase name tags, and the name of the passenger indicated on the airline ticket corresponded without exception. (Tr. 37-38) The contents of Mr. Place's hand purse were also viewed by Officer McGavock as Raymond Place looked inside it for identification. (Tr. 64) Additionally, Mr. Place gave the two officers permission to examine his checked suitcases, but the officers noted that there was less than five minutes until departure of Mr. Place's flight and therefore allowed Mr. Place to depart. (Tr. 22) Then, based upon Mr. Place's departing comment that he suspected the officers of being police officers when he saw them back in the lobby area, Officer McGavock rushed to the baggage loading area to get all the information he could from the two name tags on Mr. Place's suitcases. (Tr. 22-23)

When Officer McGavock arrived in the baggage area, he located the two suitcases and had 15-30 seconds to write down the identity information on the suitcase name tags. (Tr. 55) The information was identical in all respects except Officer McGavock testified one name tag had the street number 1865 while the other had the street number 1885. (Tr. 56) After taking steps to attach some significance to the address information, Officer McGavock communicated his suspicions about Mr. Place to Agent Gerard Whitmore of the Drug Enforcement Administration in New York. (Tr. 27)

Officer McGavock asked Agent Whitmore to meet National Airlines Flight No. 136 at La Guardia International Airport and to monitor Mr. Place's activities there and take "whatever action they might deem appropriate based on what I had told him." (Tr. 68) Officer McGavock told Agent Whitmore that he was basing his suspicions mainly on Mr. Place's actions in

the lobby—staring and looking around closely at the people in the lobby and relating he had picked out 4 or 5 individuals as police officers. (Tr. 67)

B. Summary of Facts Incident to the Seizure of Raymond Place and the Seizure of Raymond Place's Two Suitcases at La Guardia International Airport

At approximately 3:30 p.m. on August 17, 1979, Gerard Whitmore, an agent with the Drug Enforcement Administration, watched passengers deplane from National Airlines Flight No. 136 arriving at La Guardia International Airport from Miami. Agent Whitmore was accompanied by another agent, Alfredo Iglesias, who also surveilled passengers exiting this particular flight. (Tr. 75) Both Agent Whitmore and Agent Iglesias were specifically looking for a person previously described to them and identified for them as Raymond Place. (Tr. 76) The surveilling of this particular flight and the individual monitoring of Raymond Place's activities were the direct result of a telephone conversation between Agent Whitmore and Officer Robertson McGavock. (Tr. 104) In the telephone conversation between McGavock and Whitmore, Officer McGavock informed Agent Whitmore that a passenger identifying himself as Raymond Place was aboard National Flight No. 136. Agent Whitmore was also given a description of Raymond Place and was asked to meet Flight No. 136 when it arrived at La Guardia and to monitor Raymond Place when he deplaned. (Tr. 104-105) The basis for the request by Officer McGavock that Agent Whitmore meet Flight No. 136 and monitor Mr. Place's activities was Officer McGavock's suspicions aroused by Mr. Place's activities while at Miami International Airport prior to boarding

Flight No. 136. Agent Whitmore had no previous knowledge of Raymond Place other than that he received from Officer McGavock. (Tr. 106) Agent Whitmore planned to observe Raymond Place and determine in his mind if Mr. Place was, indeed, acting suspicious. (Tr. 106)

Raymond Place was among the first 25 or 30 passengers deplaning Flight No. 136. (Tr. 106) Agent Whitmore observed Mr. Place "looking around, and thought such activity was extremely unusual." (Tr. 108) However, Agent Whitmore admitted that had he not been specifically observing Mr. Place, his attention may not have been drawn to this particular passenger. (Tr. 109)

According to Agent Whitmore, surveillance of Mr. Place was not continuous, but was voluntarily broken off between the deplaning area and the baggage claim area. During this interim period when Mr. Place was not being surveilled, Agent Whitmore positioned himself outside the railing surrounding National Airlines baggage claim area. (Tr. 77) Shortly after taking up this position, Agent Whitmore observed Mr. Place approach the baggage claim area from the direction of an adjoining baggage claim area. Once Mr. Place arrived at the designated baggage claim area, Agent Whitmore continued to be suspicious because of Mr. Place's scanning of the area. (Tr. 77-78)

When National Airlines Flight No. 136 baggage began arriving, Raymond Place proceeded to collect his two suitcases as they appeared on the carrousel. (Tr. 78-79) Mr. Place then presented the security person with his baggage claim stubs and began to walk away from the National Airlines baggage area toward the

TWA baggage area. (Tr. 79-80) Agents Whitmore and Iglesias exchanged glances and head nods and then proceeded to follow Mr. Place to TWA's baggage claim area. When Mr. Place reached the TWA baggage area, he placed a call on a direct-line limousine service telephone. (Tr. 83) The decision to approach Mr. Place for purposes of interviewing him was made by Agent Whitmore when he observed Raymond Place complete this limousine telephone call. (Tr. 83) Agent Whitmore testified that the purpose of the interview was to have Mr. Place explain his suspicious activity. (Tr. 127)

When the investigatory stop was initiated Agent Whitmore produced his own credentials and identified himself as a federal narcotics agent to Mr. Place. Agent Whitmore testified that Mr. Place asked him "why we [Whitmore and Iglesias] had stopped him." (Tr. 84) In response to Mr. Place's question, Agent Whitmore informed him that information had been received from the Dade County Public Safety Department, and that "based on observations that Agent Iglesias and [Whitmore] had made at the airport, that [Whitmore] was under the belief that there was a possibility that he was carrying narcotics." (Tr. 84) Mr. Place was next asked whether the luggage he had with him belonged to him, and then he was asked to produce identification and his airline ticket. (Tr. 85) Mr. Place was never asked to explain why he was scanning the area or why he appeared to be nervous, even though the purpose of the interview was to allow him an opportunity to offer such an explanation. (Tr. 126-127) The airline ticket and the drivers license produced by Mr. Place confirmed the information already communicated to the agents by Officer McGavock. Indeed, Agent Iglesias ran a NCIC computer check utilizing the information provided by

Mr. Place's drivers license and determined there was no basis for holding Mr. Place for further questioning. (Tr. 92)

The agents seized the two suitcases possessed by Mr. Place and acknowledged by Mr. Place to belong to him. This seizure was without the consent of Mr. Place. (Tr. 128) Agent Whitmore also admitted his intentions to take custody of the two suitcases regardless of whether or not Mr. Place consented to the seizure. (Tr. 129)

REASONS FOR GRANTING THE PETITION

The facts in this case present, again, an opportunity for this Court to take a definitive position on the constitutional question which is invariably raised by the so-called "drug courier profile" seizures. Such profile seizures are occurring with increasing frequency at major metropolitan airports. This Court is now presented with a factual situation that is unobscured by the issues of "consent" or "preservation of the question", as were encountered in *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Reid v. Georgia*, 448 U.S. 438 (1980). A clear course may now be charted. The question of whether an air traveler's Fourth Amendment rights are violated when he is stopped for questioning by law enforcement authorities, whose initial feelings of suspicion exist solely because of certain profile characteristics exhibited by the air traveler, may now be answered.

The importance of the question which this Court is requested to determine has previously been recognized, and review of such question has been granted by this Court in the case of *Florida v. Royer*, 389 So.2d 1007

(Fla. 3rd DCA 1980), cert. granted, No. 80-2146 (Nov. 30, 1981). The significance and far-reaching effects that a final resolution of this question would have upon citizens, who are travelers, and law enforcement authorities, who are continually grappling with the shifting parameters of "reasonableness" and "show of authority", strongly suggest that this Court resolve with finality the question presented by this Cross-Petition.

In order to assess the reasonableness of law enforcement authorities' efforts to intercept drug couriers transporting narcotics between so-called source and distribution centers in the United States, a balance must be reached between such governmental efforts and the constitutionally protected interest of the private citizen to be free from unrestricted intrusions. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The decision of the court of appeals fails to confront the question presented herein, but, nevertheless, reverses the district court's denial of the Motion to Suppress Evidence on other grounds. The government presently seeks review by this Court of the court of appeals decision; however, the review sought by the government is limited to the singular issue that the court of appeals found dispositive of the case. To limit this Court's review to the single issue presented by the government, is to avoid the determination of an important and recurring question concerning Fourth Amendment rights.

Until and unless this court determines the constitutionality of the stopping for questioning of private citizens, who are air travelers, by law enforcement authorities, whose sole criteria for such stops is the exhibiting of certain profile characteristics by the air traveler, the individual law enforcement authorities'

discretionary subjective sense of suspicion will continue to extend the "exception" to the general rule of probable cause which was initially created by this Court in *Terry v. Ohio, supra.*

CONCLUSION

The Cross-Petition for a Writ of Certiorari should be granted.

JAMES D. CLARK
Attorney at Law
April, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1312—September Term, 1980
(Argued May 14, 1981 Decided September 16, 1981)

Docket No. 81-1034

UNITED STATES OF AMERICA, APPELLEE

—against—

RAYMOND J. PLACE, DEFENDANT-APPELLANT

Before:

KAUFMAN, MANSFIELD and OAKES,
Circuit Judges

Appeal from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841 (a) (1), entered in the Eastern District of New York, Thomas C. Platt, *Judge* (498 F. Supp. 1217).

Reversed.

MANSFIELD, *Circuit Judge:*

The pivotal question raised by this appeal is whether a warrantless government seizure of a per-

son's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment rights. We hold that it does.

Raymond J. Place appeals from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841 (a) (1), entered in the Eastern District of New York by Judge Thomas C. Platt after denial by a Memorandum and Order, 498 F. Supp. 1217, of his motion to suppress the contents of luggage seized from him at LaGuardia Airport, and his subsequent plea of guilty with reservation of his right to appeal the ruling on his motion to suppress. Place contends that in violation of the Fourth Amendment law enforcement officers stopped him at both Miami International and LaGuardia Airports without specific articulable facts justifying a reasonable suspicion that he was engaged in unlawful activity and that they made a warrantless seizure of his suitcases at LaGuardia Airport without probable cause. Since the warrantless LaGuardia seizure of his suitcases without probable cause was unreasonable, precluding their being used as evidence against him, we reverse.

On Friday, August 17, 1979, Place entered the Miami International Airport for the purpose of boarding a National Airlines flight to New York's LaGuardia Airport. While on line to purchase his ticket he attracted the attention of two Dade County detectives who were observing passengers in the terminal. The officers observed him scanning the area of the terminal and noticed that he appeared extremely nervous. They watched him for 20 minutes while he stood on line for his ticket and noticed that he in turn was beginning to watch them, although he pretended not to do so.

After Place had purchased his ticket and checked his bags, the detectives separated. One followed Place as he headed for the departure gate, the other went to check the name on Place's baggage. Place did not, however, proceed directly to the departure gate. Instead he walked part of the way there, turned around, walked around the waiting room in a circle while looking over his shoulder, and then stopped in a rest room.

The two detectives rejoined at this point, and, when Place came out of the rest room shortly thereafter, they followed him to the airline security checkpoint. At this point the agents proceeded to approach Place, asking him his name and requesting that he produce identification. He gave both. The detectives explained that they were investigating narcotics traffic and requested the right to examine Place's baggage. Place said that he did not use narcotics, that he did not have any in his baggage, and that the detectives were welcome to examine that baggage. Because there were only five minutes left before Place's flight to New York, the detectives did not search the bags and bid him farewell. As they parted Place turned around and said to the officers that he had recognized that they were policemen.

This remark caused the detectives to rush to the baggage loading area and re-examine Place's bags. In so doing they noted Place's address on the bags and observed a slight discrepancy between the street numbers given on the two bags. The detectives then obtained from National Airlines the call back number Place had given it for his reservation. They called the police department of Hallendale, Florida, the town in which the baggage addresses were located, and inquired whether those addresses existed and

what the address associated with the phone number was. They were informed that neither address existed but that the number was that of a third address on the same street.

On the basis of this incident and the information they had obtained, the detectives called Special Agent Gerard Whitmore of the New York office of the Drug Enforcement Agency (DEA). They informed Whitmore of the events that transpired at Miami International Airport and of the information they had obtained about Place.

Relying on this information, Agent Whitmore and another DEA agent, Alfredo Iglesias, waited for Place at the National Airlines arrival gate in La-Guardia Airport. They recognized Place among the passengers arriving at the gate from the description they had received. He was engaged in a conversation with another passenger as he and that passenger walked through the terminal. While the two walked through the terminal, Place surveyed the area around him, as he had done in Miami. Fearing that he would spot them if they continued observing him, the agents proceeded to the baggage claim area, awaiting his arrival.

Place soon arrived near the baggage claim area, but did not enter it. Instead he stood outside, again scanning the area. When the flight's luggage arrived he entered the area. After fiddling with the handle of one bag, he picked up his two bags and walked out of the area. The two agents followed him, but were careful to avoid appearing to do so. Place walked to the TWA baggage claim area, continuing his scanning as he went. When he arrived there he used one of the telephones, apparently to call a limousine.

Agent Whitmore now decided to interview Place. He and Agent Iglesias walked up to Place and identified themselves as federal narcotics agents. Place responded by saying that he had known that the two were "cops." He then asked why he was being stopped and was told it was because, based on information from the Dade County police and on their own observations, the agents suspected him carrying narcotics. Place did not say anything and Agent Iglesias asked him if the bags he was carrying were his. He replied that they were.

At this point Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. This was contrary to what the agents had been advised by the Dade County detectives. Whitmore stated that he had understood that Place had not been searched. Place replied that that understanding was incorrect; he had, he claimed, been searched. The agents then asked for and Place produced identification—a New Jersey driver's license and his airline ticket receipt.

Agent Whitmore now asked Place if he would consent to a search of his baggage. Place refused. Whitmore told Place that the agents were "going to take the luggage to a neutral party, to a Federal judge, to make a determination as to whether or not there was probable cause for a search warrant." Place was also told that he was free to accompany the agents on this trip. It was then that Agent Iglesias took the driver's license to run a computer check on it, which revealed no violations.

When Iglesias returned he again asked Place if the bags were his. Place said that the larger of the bags was definitely his but that he was unsure about the smaller because it had had his name tag on it in Miami and the tag was no longer attached. After

the agents asked Place to provide the combinations of the bags' locks, which he refused to do, Iglesias picked up the bags and Whitmore gave Place a piece of paper with his office number and a 24-hour emergency number at which he could be reached. Place then ran after Iglesias and demanded that he give his name and badge number. Iglesias gave his name and said that he could be reached at the same telephone numbers.

The agents put the bags in the car and drove to Kennedy Airport, leaving at about 4:10 P.M. and arriving approximately 35 minutes later. After a delay in finding a dog handler, the suitcases were subjected to a "sniff test" by "Honey," a dog trained to detect controlled substances. At about 5:30 or 5:40 P.M. Honey reacted positively to (i.e., detected a controlled substance in) the smaller bag and neither positively nor negatively to the larger. Agent Whitmore contacted the United States Attorney's office and asked for instructions. He was told to wait until Monday morning (the day being Friday) and at that time to come to apply for a search warrant.

On Monday morning Agent Islesias applied for a search warrant for both bags. A federal magistrate granted a warrant for the smaller bag only on Monday afternoon. On opening that bag Whitmore found bags containing 1,125 grams of cocaine. The indictment, motion to suppress, and guilty plea followed.

DISCUSSION

At the outset, review of a few relevant constitutional principles is helpful. The Fourth Amendment protects not only "persons" but their "effects" against "unreasonable" government "seizures." With rare exceptions the seizure of a person or his effects

is deemed *per se* "unreasonable" unless a warrant has first been obtained from a neutral magistrate upon a showing of probable cause. *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

"Probable cause," while not requiring evidence sufficient to convict, *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963), nevertheless cannot exist in the absence of sufficient evidence to lead a reasonable and prudent person to believe, not merely suspect, that a crime has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949); *United States* v. *Ceballos*, ____ F.2d ____ (2d Cir. 1981), Dkt. No. 80-1420, Slip Op. 3983, 3999-4000.

Even in those rare instances where warrantless seizures are permitted, such as the "automobile exception," *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the police must still have probable cause, *id.* at 51, but the seizure is allowed for the reason that, because of the exigencies of the situation with which they are confronted, the police cannot obtain the timely issuance of a warrant without losing the criminal or his contraband. Even in those exceptional cases the powers of law enforcement agents have been carefully restricted, see, e.g., *Robbins* v. *California*, ___ U.S. ____, 101 S.Ct. 2841 (1981); *United States* v. *Chadwick*, 433 U.S. 1 (1977). Seizures for "investigatory" purposes have consistently been declared unconstitutional, see, e.g., *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

> " 'The requirement of probable cause has roots that are deep in our history.' *Henry* v. *United States*, 361 U.S. 98, 100 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth

> Amendment. . . . The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. See *Brinegar* v. *United States*, *supra*, at 175-76.
>
> ". . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway* v. *New York*, 442 U.S. 200, 213-14, (1979).

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Supreme Court opened a narrow exception to the foregoing principles, permitting a brief "on-the-spot" investigative stop of a person by police where probable cause did not exist but the officers were possessed of sufficient specific articulable facts to justify a reasonable suspicion that the person stopped was engaged in unlawful activity. See in accord, *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *United States* v. *Brignoni-Ponce*,

422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Sibron* v. *New York*, 392 U.S. 40 (1968). The exception was made for the reason that upon balancing the public interest in protection from crime against the individual's right to security of his person and effects free from arbitrary interference by law officers, it was decided that the intrusion was so "minimal" in contrast to traditional arrest and seizure that a limited leeway should be permitted in the interest of law enforcement. *Dunaway* v. *New York*, *supra*, 442 U.S. at 209-11. Indeed some members of the Court (Justices Stewart and Rehnquist) were of the view that such conduct did not amount to a "seizure" as that term is used in the Fourth Amendment, *United States* v. *Mendenhall*, 446 U.S. 544, 551-57 (1980).

Thus the degree to which a person's liberty may be curtailed when law enforcement agents have less than probable cause is determined by balancing the "public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878. *Terry* upheld the brief stop and frisking of a suspect for weapons as justified by the combined governmental interests in preventing crime and in protecting police officers confronting potentially armed suspicious individuals. *Brignoni-Ponce* upheld the stopping of an automobile and the questioning of its occupants within 100 miles of the Mexican border when reasonable suspicion existed and the procedure generally took less than a minute. 422 U.S. at 880.

Terry soon provided the principal weapon used by law enforcement authorities to curtail use of commercial airlines as a means of unlawful transportation of narcotics and other contraband. Passengers

suspected of acting as couriers could now lawfully be stopped for interrogation by officers having a reasonable basis for suspecting them of criminal activity. Gradually various sets of circumstances deemed sufficiently objective and articulable in combination to justify a reasonable suspicion of unlawful activity were developed, with courts usually sympathetic toward upholding investigative stops on the basis of facts that would normally be viewed as innocent but for characterizations of government agents, including a "nervous" appearance on the part of the passenger; his arrival from a "source" city (i.e., a city described on the *ipse dixit* of drug enforcement law officers as a drug-trafficking center, without any supporting evidence); the passenger's looking "steadily ahead" after alighting from a plane; his frequently glancing sideways or backwards as if searching for someone; his deplaning as the first of the alighting passengers; his deplaning last; his cash purchase of his ticket rather than through a credit card; his appearing to be a person of Hispanic background; the "reputation" of the passenger as a narcotics dealer; and the like. Some drug enforcement agents, such as the "ubiquitous" Agent Whitmore in the present case, *see United States* v. *Forero-Rincon*, 626 F.2d 218, 220 n.4 (2d Cir. 1980), were recognized as having made stops in a substantial number of past instances where their suspicions proved to be correct but without evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops. Such airport stops, for instance, have been upheld by us in *United States.* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert denied*, 447 U.S. 907 (1980); *United States* v. *Vasquez-Santiago*, 602 F.2d 1069

(2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979); *United States* v. *Rico*, 594 F.2d 320 (2d Cir. 1979); *United States* v. *Riquelmy*, 572 F.2d 947 (2d Cir. 1978); *United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977). However, in *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980), we concluded that the complex of conduct viewed by Agent Whitmore in that case was "wholly insufficient to constitute 'specific and articulable' facts supporting a reasonable suspicion that [the defendants] were involved in drug trafficking," *id.* at 36. Finally, an end was put to the gradual relaxation of the factors justifying reasonable suspicion by the Supreme Court in *Reid* v. *Georgia*, 448 U.S. 438 (1980), where it concluded that the drug enforcement agent at the airport "could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 441.[1]

Turning to the present case, the record is clear that the drug enforcement agents did not have probable cause to arrest Place or seize his baggage at LaGuardia Airport. Nervous behavior, traveling from a so-called "source city," minor errors on a baggage tag, telling an undercover officer that his identity as such was recognized by the suspect, and

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[1] The lower court had relied on the facts

> "that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags." 448 U.S. at 441.

the other factors involved here may be abnormal, but by themselves they are clearly not enough to constitute probable cause. The district court, while stating that it would not "pass on that question" (existence of probable cause), 498 F. Supp. at 1228 n.7, erred in suggesting that probable cause existed. Indeed the government does not argue on this appeal that probable cause existed. Instead, it points to a combination of circumstances observed by law enforcement officials at the Miami and LaGuardia Airports, which were found persuasive by the district court, as providing articulable facts justifying a reasonable suspicion of narcotics trafficking.[2] Place,

---

[2] At Miami International Airport the following facts were relied upon:

"1. Defendant Place was departing from a 'source city.'

"2. Defendant systematically scanned the immediate area in the lobby in which he was standing and looked very closely at each person that was seated or standing in that area.

"3. Defendant noticed and paid close attention to Mr. McGavock when he left the line.

"4. Defendant stared directly at the detectives two or three times as the detectives moved around the lobby.

"5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby again.

"6. Defendant paid for his ticket in cash.

"7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

"8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed." 498 F. Supp. at 1224.

[Footnote continued on page 13a]

on the other hand, lists other circumstances in rebuttal and argues that many of those relied on by the government are wholly consistent with innocence.[3] We find it unnecessary to resolve this issue

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[2] [Continued]

The following additional facts were claimed to justify the LaGuardia Airport stop:

> "1. Defendant Place broke out into a sweat when asked about narcotics by Detective McGavock and Facchiano in Miami International Airport.
>
> "2. Defendant Place's parting remark to the same detectives that he had spotted them in the lobby.
>
> "3. The discrepancy between the addresses listed on the identification tags attached to defendant's baggage.
>
> "4. The fact that neither of those addresses were known to exist.
>
> "5. Defendant's scanning activity in LaGuardia Airport.
>
> "6. Defendant's nervous behavior and conduct in LaGuardia Airport.
>
> "7. Defendant's spontaneous remark on being approached by the special agents that 'I knew you guys were cops. I spotted him as soon as I got out of the Plane.'" 498 F. Supp. at 1225-26.

[3] Place notes that at Miami:

> 1. The stop was made because the detective "had a feeling."
>
> 2. The information Place gave was accurate and the discrepancy on his luggage tags was minor.
>
> 3. The detectives had no previous knowledge that he was involved in the "drug culture."
>
> 4. There were no suspicious indications that Place had contraband hidden in his clothing.
>
> 5. He was alone and therefore there were no suspicious signals or attempts to avoid being seen with compatriots.

He further notes that at LaGuardia:

[Footnote continued on page 14a]

for the reason that, even assuming that circumstances justifying an investigatory stop existed, the prolonged seizure of Place's baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights.

Whether or not an investigative stop be labelled a "seizure," see *United States* v. *Mendenhall*, *supra*, 446 U.S. at 552, its legality depends on its brevity and relative unintrusiveness. The word "stop" implies an interruption of short duration, restricted to the immediate vicinity in which it occurred. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope," *Dunaway* v. *New York*, *supra*, 442 U.S. at 210. Applying the principle that "[t]he greater the intrusion, the stronger the basis for the officers' action must be," *United States* v. *Vasquez*, 638 F.2d 507, 520 (2d Cir. 1980), the investigative stop has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found and his baggage located. See, e.g., *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880 ("usually consumes no more than a minute"). Where the suspect has been removed by the police from the spot where he was confronted to another location such as a police station, even for a short period, the conduct has been held to violate the Fourth Amendment. See, e.g., *Dunaway* v. *New York*, *supra*, 442 U.S. at 212-13, which held unconstitutional a seizure

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[3] [Continued]

1. He was not asked to explain his scanning or his nervousness even though he was being stopped in part because of them.

2. A computer check of his driver's license revealed nothing suspicious about him.

of a defendant that, while not an arrest under state law, was so intrusive as to be "indistinguishable from a traditional arrest," 422 U.S. at 212.

It has been contended that *Terry*, while applicable to investigative stops of persons, should not permit police detention of "effects," since the latter, unlike a person, "cannot resume their course independent of the owner" after the property has been temporarily seized. See Comment, *Seizing Luggage on Less than Probable Cause*, 18 Am. Crim. L. Rev. 637, 645 (1981). However, for present purposes, in addition to assuming without deciding that an investigative stop was justified, we are willing also to apply the principles of *Terry* to seizures of property. If these principles were not applicable, the warrantless seizure of Place's baggage without probable cause would clearly violate the Fourth Amendment.

Applying the foregoing principles, it is apparent that the prolonged seizure of Place's baggage cannot be upheld as an investigative stop and will not stand constitutional scrutiny. The initial detention of Place and his baggage at LaGuardia, even if justifiable as an investigative stop, failed to yield any evidence providing probable cause for the arrest of Place or the further seizure of his baggage. No information was uncovered indicating that his baggage contained narcotics. He produced his New Jersey driver's license and his airline ticket receipt but refused, as was his constitutional right, to consent to a search of his baggage. At that point the agents were under a duty to release him and his baggage. Yet the agents, while permitting him to go, took his baggage away from him, without his consent, for a substantial period of time, removing it to another location several miles away for a period of at least 1½ to 2 hours for the admitted purpose of determining

whether it contained narcotics. The question before us is whether this amounted to a reasonable warrantless investigative stop of his baggage without probable cause within the meaning of *Terry*. We hold that it did not.

There can be no question but that if the agents had taken Place himself into custody and removed him from LaGuardia to the J.F. Kennedy Airport for the purpose, through use of a trained sniffing dog, of determining whether he had narcotics on his person, this would have constituted an unlawful seizure of him in violation of his Fourth Amendment rights. *Dunaway* v. *New York*, *supra*, 442 U.S. at 216 (removal of suspect to police station for interrogation without probable cause held to be an unreasonable seizure). It may be argued that a different standard of reasonableness should apply to a detention of baggage than that of a person, on the theory that the inconvenience to the owner from seizure of his baggage may be less than when he is personally arrested without a warrant and that the intrusion is less severe. But the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

The degree of intrusion and inconvenience accompanying police seizure of a person's baggage in a particular case may vary according to the specific circumstances, including the duration of the detention and the person's immediate needs. If, for instance, the owner were about to board another plane

for distant parts, or needed medicine from his baggage essential for treatment of a heart or diabetic condition, or was deprived of documents or merchandise necessary to close an important business transaction, the seizure of his baggage for any substantial period of time could be extremely harmful or even catastrophic. If, on the other hand, the person were not in any such hurry or had no such emergency personal needs, it could be argued that a greater invasion of his personal freedom or use of his property should be tolerated. But the reasonableness of a detention without probable cause should not turn on whether the person affected is a healthy vagrant with time on his hands or a busy, ulcer-ridden bank president or doctor who needs his baggage immediately to perform important pressing missions.

Such a case-by-case status test is unacceptable. Courts which have addressed the reasonableness of particular forms of detention have focused on factors unrelated to the particular inconvenience to the individual in the specific case before them, concentrating on the general nature and extent of the detention. See, e.g., *United States* v. *Walling*, 486 F.2d 229 (9th Cir. 1973). it is this desire for an objective standard of equal application that has led to a recommendation by the American Law Institute that a detention not based on probable cause and not consented to be limited to a maximum of twenty minutes' duration. *ALI Model Code of Pre-Arraignment Procedure* § 110.2 (1) (1975). Otherwise the "investigative stop" concept would soon undermine the basic probable cause requirement, which represents a careful weighing of the conflicting interests of the government in effective law enforcement and the individual in personal freedom. The standard must be judged according to the

effect its application would have upon the average innocent passenger, and not, with the aid of 20-20 hindsight, by the success it yielded in uncovering contraband in a particular case. One must take into account the probably countless other cases where the detention without probable cause did not uncover any incriminatory evidence.

In the present case, if the agents had, on the basis of a reasonable suspicion but without probable cause, merely exposed Place's baggage to a trained sniffer as he was passing through LaGuardia, this brief detention might, assuming reasonable grounds for suspicion, fall within the limits of *Terry* and its progeny. The invasion of his rights would then have been brief and minimal. Here, however, the "investigative" seizure lasted for almost two hours (from slightly before 4:00 P.M. until 5:45 P.M. when the sniffer established probable cause). Moreover, measured by the more objective gauge of what would have occurred if probable cause had not been established, the seizure would have been protracted for at least another 35 minutes, or until 6:15 P.M., before the baggage would have been returned from JFK Airport to LaGuardia and delivered to its owner.

In our view this protracted dispossession cannot reasonably be characterized as a *Terry*-type "investigative stop." It amounted to a seizure without probable cause of Place's effects in violation of his Fourth Amendment rights. The violation was exacerbated by the high-handed procedure adopted by the agents. They did not inform Place of the place to which they were taking his baggage or how long he might be dispossessed of it. Agent Iglesias simply removed the bags without consent and Agent Whitmore gave Place a piece of paper with his office number and a 24-hour

emergency number at which he could be reached. Indeed, the agents lied to Place, informing him that they were taking the baggage to a federal judge when in fact they were transporting it to JFK Airport. As far as the owner was concerned the "investigative" seizure of his baggage might last for days or weeks. This conduct is not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment. A person is at least entitled to be informed accurately of the reason for seizure of his effects, the place to which they are being taken, and, assuming probable cause is not found, approximately when he may expect the return of his property.

In reaching our decision we have not overlooked the seriousness of the suspected offense in the present case or the danger posed by the suspect to the public, which must be balanced against the individual's right to have his personal effects free of arbitrary interference by law enforcement officers. *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21; *United States* v. *Brignoni-Ponce*, *supra* 422 U.S. at 878; *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (Opin. of Powell, J.). The public interest in prevention of drug trafficking is great. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 565. But the government has not adduced any evidence that intrusions of the seriousness inflicted here are essential to enforcement of our drug laws. On the contrary, the fact that the government keeps a trained drug sniffer at JFK Airport, which presumably is available for immediate scenting of baggage suspected of containing narcotics, would indicate that it should be able to maintain a similar facility at a busy airport such as LaGuardia. Indeed, having been alerted by phone calls from the detectives at Miami Airport, 2½ hours away by air, that Place was sus-

pected of bringing drugs in his baggage, no reason has been shown why Agents Whitmore and Iglesias could not have had the sniffing dog, while Place was in transit, brought from JFK Airport to LaGuardia, ready to perform its task with minimum detention when Place arrived at LaGuardia.

The government's reliance upon *United States* v. *Van Leeuwen*, 397 U.S 249 (1970), as support for the seizure of Place's bagage is misplaced. That case is clearly distinguishable. There the owner of parcels deposited them as first-class mail with the U.S. Postal Service, thereby voluntarily relinquishing custody and control over them for the indefinite period (at least a couple of days) required for forwarding and delivery. Based on specific articulable facts justifying suspicion that the packages contained contraband, postal agents detained the packages, which were already in their lawful custody, for further investigation which led to issuance of a search warrant. Unlike the dispossession of hand baggage in a passenger's custody, which constitutes a substantial intrusion, the mere detention of mail not in his custody or control amounts to at most a minimal or technical interference with his person or effects, resulting in no personal deprivation at all. Moreover, the *Van Leeuwen* Court was very careful to point out that "[w]e only hold that on the facts of this case" a short detention of mail is reasonable; it also conceded that "[t]heoretically . . . detention of mail could at some point become an unreasonable seizure." 397 U.S. at 252-53. Under the circumstances of this case, reliance on *Van Leeuwen* is unjustified.

For these reasons we find unpersuasive the decisions of other circuits upholding on the basis of *Van Leeuwen* the constitutionality of detentions of baggage as *Terry*-type investigative stops. See *United*

States v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). Moreover, in none of these cases does it appear (1) that the detention of the baggage for investigation lasted for as long a period of time as in the present case, (2) that the baggage was removed from the airport to another location without the passenger's consent, (3) that the agents concealed their plans for investigation of the baggage, or (4) that they indicated that the baggage detention would be of indefinite duration. On the contrary, in each case the agents merely asked the suspect to wait for a short period of time while a sniffing dog was brought to the scene. Although in *Viegas* that baggage was retained at the airport for a longer period because of the unavailability of the dog, the suspect there had already expressly consented to "a detector dog sniff," 639 F.2d at 44. Thus the intrusions did not approximate the seriousness of that here. As indicated above, if such expeditious procedure had been followed in the present case the detention might then have been upheld as a permissible investigative stop. See *United States* v. *Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.W. 918 (1976). It is simply not a "temporary detention for investigative purposes" when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment rights.

The judgment of conviction is reversed.

OAKES, *Circuit Judge* (concurring):

I happily concur in the well reasoned opinion of Judge Mansfield which conforms, I believe, wholly to the Fourth Amendment law as so far enunciated by the Supreme Court.

In so concurring, however, I by no means retract or qualify the view first enunciated for this court in a border stop case, *United States* v. *Barbera*, 514 F.2d 294 (2d Cir. 1975), and further elaborated upon in my dissenting opinion in *United States* v. *Vasquez*, 612 F.2d 1338, 1352 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980). That view, simply stated and deriving in large part from the views perhaps best expressed by Professor Anthony Amsterdam in his Holmes Lecture, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367 (1974), that the Fourth Amendment should be read not atomistically, but regulatorily. Such a view leads one to conclude that in cases such as the so-called airport stop or search case here, sidestepping strict requirements of probable cause in warrantless searches or seizures should be permissible only if, as, and when the search or stop is made pursuant to duly adopted, proper, nondiscriminatory, and reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review. Absent such rules or regulations we are so much in the realm of the individual law officer's discretionary subjective sense of suspicion as to permit of the arbitrariness and unbridled official caprice that led our Forebears, as Judge Mansfield suggests, to adopt the Fourth Amendment. Until better advised by higher Authority, I will continue to take what some would call a narrow view of extension of the "exception" to the general rule of probable cause set forth in *Terry* v.

Ohio, 392 U.S. 1 (1968). I am satisfied that Judge Mansfield has taken a similar view with conventional case support, and I write this concurrence only to refer to this somewhat less conventional view which nevertheless continues to find what seems to me like a receptive ear in some of the expressions in more recent Supreme Court opinions. *See, e.g., Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979):

> To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor *upon some other substantial and objective standard or rule* to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . . ." *Terry* v. *Ohio, supra*, 392 U.S. at 22, 88 S.Ct. [1868] at 1880.

(Emphasis added.)

KAUFMAN, *Circuit Judge*, dissenting:

The majority holds that the detention of Raymond Place's cocaine-filled luggage, even if an investigatory stop were justified, constituted a violation of Place's Fourth Amendment rights. It takes this position because it is of the opinion that a holding to the contrary would extend *Terry* "stops" into a general search warrant.[1] I cannot agree that the investiga-

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[1] One cannot quarrel with the notion that *Terry* stops, approved by the Supreme Court, expanded the law in a manner which some seem to find unsettling. The Supreme Court, however, ever mindful of the need to protect precious Fourth Amendment rights, safeguards them zealously. The Court, guided by the tenets of the Constitution, has thoroughly con-

tive stop of Place's luggage was unreasonable within the meaning of *Terry* or that affirmance of the district court's holding would produce an untenable result. Accordingly, I dissent.

The Fourth Amendment prohibits only those seizures which are "unreasonable." Although searches conducted without prior judicial approval are considered "unreasonable," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), *Terry* instructs that a law enforcement official may, in appropriate circumstances, detain a person to investigate possible criminal activity without possessing either warrant or probable cause to arrest. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968). In assessing the propriety of these so-called *Terry* stops, courts must evaluate the scope of the particular intrusion. *Id.* at 17 n.15. *See Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Mendenhall*, 446 U.S. 544 (1980). Furthermore, in determining the intrusiveness of a stop, the government interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy. *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States* v. *Mendenhall*, *supra*, 446 U.S. 561 (Powell, J. concurring).

I fail to see how the majority, after weighing the competing interest involved here, could conclude that the *Terry*-type stop amounted to a seizure in violation of Place's Fourth Amendment rights. The public interest in holding the suitcase for a "sniff test" was

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sidered the constitutionality of *Terry* stops and has resolved the issue. Where the facts fit the *Terry* principles, I do believe lower courts consider the Supreme Court's mandate the governing authority. [This footnote was added after the slip opinion was first published. See page 29a, *infra*.]

compelling—detection of an individual who trafficks in drugs. *See United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (Powell, J. concurring). Surely, the 1,125 grams of cocaine Place was carrying in his suitcase could not be regarded as an amount so insignificant as not to warrant concern. In addition, if Place had been allowed to leave with his baggage, it is likely the evidence would have been destroyed. Indeed, just such a consideration forms part of the Supreme Court's rationale for permitting a warrantless seizure in some instances involving automobiles. *See United States* v. *Chadwick*, 433 U.S. 1 (1977); *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

Moreover, in answer to the agents' questions, Place falsely claimed several times that both he and his luggage had been searched in Miami, refused to admit that he owned a valise which clearly belonged to him, and suggested that the agent abandon his law enforcement duties. Coupling Place's behavior in the Miami and LaGuardia airports, conduct, we are told by experts, to be characteristic of a drug courier, with these responses reveals such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained Place's bags.

The majority, however, finds that a less than two-hour detention of Place's cocaine-filled luggage—not Place—outweighs even such a forceful governmental interest. Place, my brothers seem to deduce, suffered so great an inconvenience that his privacy interests were violated. I do not believe so. I must emphasize that this is not an instance of taking a person into custody, an event which must be supported by probable cause. *See Dunaway* v. *New York*, 442 U.S. 200 (1979). Neither are we dealing with an actual search

which must be grounded in probable cause. We merely must determine the propriety of detaining baggage. Furthermore, the majority seems to agree the investigatory stop of Place's person could have been justified. If this is so, the reasoning underlying their greater concern for Place's effects simply eludes me.

My brothers perhaps react so strongly not because the law calls for it, but because they are particularly offended by what they term the "high-handed procedure" of the agents. They fail to recollect that Place was offered the opportunity to accompany his bags. He refused, asserting he had pressing business elsewhere. Certainly Place may still have been inconvenienced had he gone with the agents, but the Supreme Court has suggested the appropriate alternative course of action to be followed: Place should simply have consented to a luggage search. *See Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979). Instead, he asked whether an "arrangement," a euphemism for a bribe, could be made so that he could leave with his suitcases. Moreover, inconvenience has never been the sole standard for delineating the reasonableness of an investigatory stop. Causing an automobile to pull over merely because of an erratic pattern of driving with a subsequent questioning of the driver and a search of the car's interior has been held permissible by the Supreme Court. *See Robbins* v. *California*, 49 U.S.L.W. 4906 (U.S., June 30, 1981). Surely, this is a greater intrusion on an individual's privacy and convenience than a brief detention of baggage.

The majority, moreover, ignores the critical difference between an individual's privacy interests in the contents of his suitcases as distinguished from the suitcases themselves. In *United States* v. *Chad-*

wick, supra, 433 U.S. at 13 n.8, the Supreme Court explicitly distinguished between these two interests by stating that a person's principal privacy interest lies not in the baggage itself, but in the contents. *Accord, Arkansas* v. *Sanders, supra*, 442 U.S. at 764. A search of the interior of the suitcase, therefore, would have been much more intrusive than temporarily removing the bags from Place's possession.

Similarly, while recognizing the importance of the privacy interest in first-class mail, the Court in *Van Leeuwen* stated that no Fourth Amendment interest was disturbed by delaying the forwarding of mail because the privacy interest was in the packages themselves; that privacy was protected until the approval of a magistrate was obtained. *United States* v. *Van Leeuwen*, 397 U.S. 249, 253 (1970). I am indeed aware of the possible difference between the privacy interest in packages placed in the mails and in luggage carried by an individual, a point the majority labors to emphasize. I do not, however, find such nebulous distinctions as persuasive as my brothers.[2] We are searching for principles

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[2] I also remain unconvinced that decisions of other circuits which consider baggage detention a *Terry* stop are distinguishable. *See United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). The majority finds differences only through ignoring patent similarities with the situation here. My brothers, for instance, claim that the agents indicated Place's luggage would be detained for an indefinite period. In *Viegas*, the agents' comments could fairly be said to imply the same notion. *See United States* v. *Viegas, supra*, 639 F.2d at 44. Furthermore, the argument for distinction is somewhat tenuous. How could it matter that the bags were moved to another location when the majority states that dispossession itself is the cardinal fault?

to guide us by turning to *Van Leeuwen*, not *minutiae*, and it seems clear to me the Supreme Court's counsel is applicable to suitcases as well as to mail. By applying the Court's reasoning, the conclusion is inescapable that detaining Place's luggage did not violate his privacy interest.

I would hold, on the facts presented to us here, that the temporary detention of Place's luggage was a reasonable "stop" within the meaning of *Terry*. At the time the bags were detained there were objective and articulable facts to warrant the agents' belief that Place's bags contained contraband. This suspicion was based on the same conduct which justified the investigatory stop of Place's person. I believe we make bad law today in holding that a valise cannot be detained under the circumstances here. This, it seems to me, totally ignores the unwarranted hurdles we are placing in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
NEW YORK 10007

A. DANIEL FUSARO
Clerk

U.S.A. v. Raymond J. Place
Docket No. 81-1034

Decided September 16, 1981
September Term, 1980

Page 4851, line 7—after "search warrant." insert new footnote call "[1]".

Page 4851, bottom of page—insert the following:

"[1] One cannot quarrel with the notion that *Terry* stops, approved by the Supreme Court, expanded the law in a manner which some seem to find unsettleing. The Supreme Court, however, ever mindful of the need to protect precious Fourth Amendment rights, safeguards them zealously. The Court, guided by the tenets of the Constitution, has thoroughly considered the constitutionality of *Terry* stops and has resolved the issue. Where the facts fit the *Terry* principles, I do believe lower courts consider the Supreme Court's mandate the governing authority."

Page 4854, line 19—delete "brothers.[1]" and insert "brothers.[2]" in place thereof.

Page 4854, bottom of page—delete footnote numeral "[1]" and insert footnote numeral "[2]" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CORRECTED COPY

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and eighty-one.

Present:

Hon. IRVING R. KAUFMAN
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges

#81-1034

UNITED STATES OF AMERICA, APPELLEE

v.

RAYMOND J. PLACE, DEFENDANT-APPELLANT

[Filed Sept. 16, 1981]

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Arthur Heller
by ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of November, one thousand nine hundred and eighty-one.

No. 81-1034

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND J. PLACE, DEFENDANT-APPELLANT

[Filed Nov. 30, 1981]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United States of America.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that

no such judge has requested that a vote be taken thereon.

/s/ A Daniel Fusaro
A. DANIEL FUSARO
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. NEW YORK

No. 79 CR 584

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAYMOND J. PLACE, DEFENDANT

Sept. 29, 1980

PLATT, District Judge.

Defendant, who is charged with violating 21 U.S.C. § 841 (a) (1), possession with intent to distribute cocaine, has moved to suppress all physical evidence taken from him by Drug Enforcement Agents on August 17, 1979. He alleges that his Fourth Amendment rights were violated when he was stopped for questioning in both Miami and LaGuardia International Airports and when his baggage was seized at LaGuardia and searched pursuant to a warrant issued by United States Magistrate John Caden.

The facts are as follows:

On August 17, 1979, Dade County Detectives Robertson McGavock, John Facchiano, [J]odi Wolf and Everett Titus were observing passenger activity at the National Airlines ticket counter in Miami International Airport. Detective McGavock had taken a place in the ticket line while the other detectives stood off to one side watching the queue. (Tr. 8-9).

During the surveillance, one person, later to be identified as the defendant in the instant case, at-

tracted Mr. McGavock's attention. (Tr. 9). Carrying two black suitcases and a brown handbag, defendant had arrived on the line directly behind Mr. McGavock, and immediately began "scanning the lobby area . . . looking very closely at each person that was seated or standing in . . . the immediate area." (Tr. 10). This systematic "scanning" continued for the entire twenty minutes that defendant spent in the line. (Tr. 10).

Five minutes after defendant entered the line, Mr. McGavock stepped out of it to speak to Detective Facchiano about the defendant.[1] As this transpired, defendant fixed his gaze upon the two detectives and continued to watch as Mr. McGavock left Mr. Facchiano and moved to different locations within the immediate lobby area. (Tr. 11-12). Each time Mr. McGavock switched positions, the defendant kept him under attentive view, though if the detective looked at him, the defendant would endeavor to appear as if he were not looking at Mr. McGavock. (Tr. 12).

Defendant finally arrived at the head of the line, paid for his ticket in cash and checked his bags. In completing this last act, he turned and looked over his shoulder to scan the lobby once again, but, when Detective McGavock came into his view he stopped scanning and focused on the detective. (Tr. 13). Defendant then turned back to the counter, completed his transaction, and began walking toward Concourse F, the departure gate for National Airlines. (Tr. 14).

Mr. McGavock then moved quickly to the counter and spotted defendant's bags on the conveyer belt. He noticed that they were tagged for LaGuardia air-

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[1] The two other detectives left the area at this time. (Tr. 12).

port, to which a National flight was scheduled to depart at 12:40 P.M.[2] (Tr. 14-15).

It is at this time that a curious ballet begins. After looking at the luggage on the conveyer belt, Mr. McGavock followed defendant as he made his way to Concourse F. Suddenly, the defendant turned and started walking back in the direction from which he had just come. As the two passed, Mr. McGavock continued on to another counter where he stopped to observe defendant. As he watched, defendant strode back to the lobby from where he had just come and walked a complete circle around the area, looking back over his shoulder continuously. (Tr. 16-17). Defendant then made his way back toward Concourse F but stopped enroute to enter a men's restroom. (Tr. 17).

At that moment, Detective Facchiano rejoined Detective McGavock and told him that the name on the bags appeared to be Place. Not more than a minute passed before defendant came out of the restroom and began, once again, to make his way to Concourse F. The detectives followed and watched as defendant got into line to pass through the various security gates now common to all airports. (Tr. 18-19).

At this juncture, Detective Facchiano approached defendant and displayed his credentials. As he did so, Mr. McGavock met them and also displayed his credentials. A conversation ensued, the essentials of which, as testified to by Mr. McGavock, are reproduced here.

Detective Facchiano, in reply to defendant's question "was there anything wrong?" told defendant,

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[2] When the bags disappeared out of sight, Detective Facchiano left for the loading area to see if there were any names on the bags. (Tr. 16).

"Sir, we have a big problem with contraband going out of here in the airport." Upon hearing this, defendant broke out into a sweat. (Tr. 19). Mr. Facchiano continued, "Sir, I was wondering whether you might show us some identification and your airline ticket." In response, defendant handed his ticket to the detective and rummaged through is brown handbag for his driver's license. Both the airline ticket and the New Jersey driver's license identified the defendant as Raymond Place. (Tr. 19-21).

As the conversation continued, it was made clear by the detectives that the "contraband" mentioned earlier, was in fact, narcotics. Defendant responded to this information by stating "Well, I don't use any stuff like that." (Tr. 21). Mr. Facchiano then asked, "Well, sir, it's nothing that you have to do but would you mind if we looked inside your suitcase." Defendant gave his consent, adding that he didn't have anything in them. (Tr. 21-22).

The two detectives looked at each other and then at their watches. The time was 12:35; defendant's flight was to leave at 12:40. Mr. Facchiano turned to the defendant and said, "Well, that's all right. Have a nice flight, Mr. Place." (Tr. 22).

Had nothing else occurred, defendant Place would probably not be in front of this Court, but defendant, as he walked back toward the security gates, turned to the detectives and said something to the effect of "Hey, I knew you guys were cops when I saw you down in the lobby." When the detectives asked him how many he had spotted, the defendant replied, "Oh, four or five" and then left. (Tr. 22).

Detective McGavock then decided to look at defendant's baggage himself. He ran to the loading area and spotted the two bags on top of a cart. The name tags were apparently visible and on both of

them was the name R. Place. The addresses on the tags, however, differed: the smaller of the two bore the address 1885 South Ocean Drive, Hallandale, Florida; the larger one had 1865 South Ocean Drive in the same city. (Tr. 24-25).

Mr. McGavock's next step was to check with National Airlines for a callback number on defendant Place's reservation. Upon obtaining that number, Mr. McGavock called the Police Department in Hallandale and asked them to check to see if the addresses existed and to see to what address the callback number belonged. Hallandale police advised Mr. McGavock that neither of the addresses existed[3] and that the telephone number was that for 1980 South Ocean Drive, Hallandale. (Tr. 25-27).

After completing this check, Mr. McGavock decided to call Drug Enforcement Agency officials in New York. He talked to DEA Special Agent Gerard Whitmore and relayed to him his observations, a description of Mr. Place, and the flight number and its time of arrival. (Tr. 27-28). Specifically, Mr. McGavock described defendant's scanning activities, his nervousness, the discrepancies on the baggage identification tags, the conversation with Mr. Place and the fact that the addresses did not exist. (Tr. 27-29).

The scene shifted to New York's LaGuardia Airport where Special Agents Whitmore and Iglesias awaited the arrival of Place's flight from Miami. With the aid of Mr. McGavock's description, the two agents observed the defendant deplane. (Tr. 75-76). As described by Agent Whitmore, the defendant was

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[3] One of the addresses, 1865 South Ocean, did, in fact, exist but Mr. McGavock did not discover that until after the 17th. (Tr. 30).

trying to keep up with another male, attempting to converse with him, and, at the same time, looking about the baggage area. (Tr. 76). Furthermore, as defendant walked down the terminal, he constantly looked behind him, and, at one point, he stopped, looked at people at the next gate, and then looked behind and around himself. (Tr. 77).

Observing this behavior and fearing that he might flee if he spotted them, the agents chose not to follow the defendant but went directly to the National baggage claim area. Defendant eventually made his way to the same area but stood outside the actual pick-up location looking at every person in the area. (Tr. 77-78). When the luggage arrived, defendant Place walked into the area, claimed his bags, and after a few minutes deliberation left the area. (Tr. 78-79).

The ballet, begun in Florida, now resumed in New York. Agent Whitmore began to follow defendant who walked down a corridor and then abruptly stopped, turned around and looked straight at the agent. (Tr. 82). To avoid the appearance of "tailing" defendant, Agent Whitmore walked by him and into a stairwell. The defendant then resumed walking down the corridor, this time with Agent Iglesias not far behind. (Tr. 82).

The defendant made his way to the TWA baggage claim area where he put down his bags and used the telephone apparently to call a limousine. At this point, Agent Whitmore decided to approach the defendant; he took out his credentials and identified himself as a Federal narcotics agent. (Tr. 83).

Defendant immediately remarked, "I knew you guys were cops. I spotted him [Iglesias] as soon as I got out of the plane." (Tr. 83). Agent Whitmore

then informed defendant that the Dade County police had relayed some information about the defendant, and based on that and on Agent Iglesias' and his own observations Agent Whitmore said that he believed "There was a possibility that [defendant] was carrying narcotics." (Tr. 84).

After identifying the bags next to him as his own and asking the agents whether they actually believed he was carrying narcotics (to which Agent Whitmore said Yes), the defendant remarked that a gang of police surrounded him in Miami and searched his person and his bags and that he had been humiliated and embarrassed by these searches. (Tr. 84). The agents told defendant that their information was to the contrary to which defendant replied "I don't care what your understanding is my luggage and I were searched at the Miami Airport." (Tr. 85.) After requesting and receiving defendant's airplane ticket and driver's license, (which Agent Iglesias took possession of in order to run a computer check on defendant), Agent Whitmore asked defendant to consent to a search of his luggage. Defendant apparently refused (Tr. 83) and was then told by Agent Whitmore that a search warrant would be sought to enable the agents to search his lugagge and that the agents would detain his bags until a Federal judge had determined whether or not such warrant should issue. In addition, defendant was told that he was free to go, that he was not under arrest, but that he could accompany the agents and his baggage to the judge. (Tr. 88-89). Defendant declined to do so but, when Agent Whitmore was the sole agent present, he twice asked Agent Whitmore if there was "some way that we could arrange for him to leave with his luggage." (Tr. 91, 94).

Although not without some hysterics on Mr. Place's part (Tr. 93-94), the agents left LaGuardia with the bags and proceeded to Kennedy Airport where they subjected the bags to a "sniff search" by "Honey", a trained police dog. "Honey", in sniffing defendant's bags which had been intermingled with other pieces of luggage, reacted positively to the smaller bag and ambiguously to the larger. (Tr. 98). The following Monday, August 20, 1979, the agents presented these facts to United States Magistrate John Caden who issued a search warrant for the smaller bag only. (Tr. 100). Agent Whitmore then proceeded, in the presence of two other DEA agents, to search the smaller bag and discovered therein approximately 1125 grams of cocaine, the evidence which defendant now seeks to suppress.

In support of this motion, defendant argues that his Fourth Amendment rights were violated by the Dade County officers when they questioned him at Miami International Airport. It therefore follows, defendant reasons, that the subsequent action taken by DEA officials was tainted by the illegality of that encounter. He also argues that the questioning in LaGuardia was illegal, that the "sniff search" was improper, and that therefore the search of the bag was unlawful. The Government, on the other hand, contends that the initial questioning was neither a stop nor a seizure within the purview of the Fourth Amendment, or, in the alternative, that even if there was a "stop", the Dade County officers had a "reasonable suspicion" based on objective and articulable facts and could therefore constitutionally "stop" defendant. They further contend that all of the other action taken by the DEA agents was proper and did not violate defendant's Fourth Amendment rights.

There has been a spate of recent decisions in this

Circuit concerning the validity of these so-called "airport stops," *see, e.g., United States* v. *Anparo Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980); *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979); *United States* v. *Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979); but the starting point for any discussion of these encounters must be Supreme Court decisions in *Reid* v. *Georgia*, ___ U.S. ___, 100 S.Ct. 2952, 65 L.Ed.2d 890 (1980) (per curiam), and *United States* v. *Mendenhall*, ___ U.S. ___, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).[4]

We begin with the *Mendenhall* decision for it is there that we find the most complete discussion, though not a satisfactory resolution, of the types of problems presented by this instant case. Briefly, the facts of that case are as follows: Ms. Mendenhall arrived in the Detroit Metropolitan Airport from Los Angeles, a "source city", was the last person to leave the plane, appeared very nervous, looked as if she were scanning the area to see if there were any agents about, carried no luggage, and changed airlines for her flight out of Detroit. Observing this behavior, DEA agents approached Ms. Mendenhall and asked to see some identification and her airline

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[4] One panel of the Second Circuit has suggested, in dicta, that *Mendenhall* does not control in these types of cases *on the issue of reasonableness* because it has no majority opinion. On that issue, *see United States* v. *Anparo Forero-Rincon*, *supra*, note 3. The *Reid* v. *Georgia* opinion, which was issued after the *Forero-Rincon* opinion does, however, have a majority ruling on the issue of reasonableness. In any event, this Court believes that the approaches suggested by the Supreme Court decisions are to be given much credit, even in the absence of a majority opinion in *Mendenhall*.

ticket. After examining both and finding discrepancies therein, the agents asked her to accompany them to the DEA office for further questions. She apparently acceded to this request and went to the office with the agents where she consented to a search of her person by a policewoman. This search produced the two packets of heroin that Ms. Mendenhall later sought to suppress. *United States* v. *Mendenhall*, ____ U.S. ____, 100 S.Ct. at 1873-74.

In considering the validity of the initial encounter, the majority of the Supreme Court split along two lines. Justice Stewart, joined by Justice Rehnquist, found that this encounter was not a "stop" or "seizure" governed by the Fourth Amendment because Ms. Mendenhall's freedom of movement was not restrained. The test postulated for gauging whether there was such a restraint is essentially one of reasonableness; it is a stop, governed by the Fourth Amendment "if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 1877. Justice Stewart continued his discussion by stating "In the absence of some such evidence [of offensive or threatening police conduct], otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person," *Id.*

Justice Powell, with whom the Chief Justice and Justice Blackman concurred, did not consider the question of whether this was a "stop" or a "seizure" governed by the Fourth Amendment because he believed that that issue was not raised properly in the *Mendenhall* case. Instead, he considered the facts and legal issues to be within the ambit of the rule announced in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889 (1968). The *Terry Rule* establishes that "a reasonable investigative stop does not [violate] the Fourth Amendment." *United States* v. *Mendenhall*, ____ U.S. ____, 100 S.Ct. at 1881. The reasonableness of a stop depends upon the facts of each case and, in particular, (i) the public interest served by the stop, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officials relied in light of his knowledge and expertise. *Id. See also, Brown* v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States* v. *Vasquez, supra; United States* v. *Price, supra.*

In addition, our own Circuit has enumerated the criteria by which to evaluate these "airport stops" as follows:

> "(1) . . . these stops will be deemed reasonable, and therefore constitutional even though warrantless, so long as they are minimally intrusive upon the detained traveler and are initiated only after the agent has observed specific and articulable facts to support a suspicion that the traveler is engaging in criminal activity and that the stop is immediately necessary, *United States* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979), and (2) that the reasonableness of the agent's suspicion must be judged upon the particular facts of each case, *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980)."

U.S. v. *Forero-Rincon*, Slip Op. at 219. (This approach naturally assumes that the "stop" is governed by the Fourth Amendment, a situation which may or may not exist in the instant case.)

With the foregoing as our guide, we examine the facts of this case.

Defendant was approached in Miami International Airport by two detectives who, according to the testimony which we credit, displayed their credentials and politely asked defendant to produce some form of identification and his airline ticket. Defendant did so. There is no evidence that the detectives used physical restraint in any form whatsoever; there is no evidence of any offensive contact; there is no evidence of any threatening gestures; and there is no evidence of any form of menacing whatsoever. *See U.S.* v. *Mendenhall, supra*, 100 S.Ct. at 1877. Moreover, the questions posed to defendant were prefaced by "Sir" and there were few, if any, imperative statements made by the detectives. The entire encounter was marked by civil and polite behavior on the part of the detectives who apparently took great care in their handling of the defendant. In addition, the encounter took place in a busy public area where the defendant could feel relatively safe that the police would not abuse him. *Compare Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

In light of all of the circumstances surrounding the incident, we conclude that a reasonable person would have believed that he was free to leave. In fact, defendant was free to leave and did so. In holding that the questioning does not fall within the ambit of the Fourth Amendment, we echo Justice Stewart's statement that:

> "The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that a person

> asking the questions was a law enforcement official. *See Terry* v. *Ohio, supra*, 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring)."

United States v. *Mendenhall, supra*, 100 S.Ct. at 1877.

The recent Fifth Circuit Court of Appeals decision in *United States* v. *Fry*, 622 F.2d 1218 (5th Cir. 1980) (per curiam), further supports our holding that there was no seizure or stop. In that case, the DEA agent, whose attention had been attracted by the odd behavior of a pair of individuals walking through the airport, sat down next to these individuals, discretely identified himself, and asked if he could speak to them for a few moments. He then requested some form of identification, and when one of the individuals gave what he considered to be evasive answers to that request, he then asked the men if they would allow a search of their persons and of their luggage. Holding that there was no stop governed by the Fourth Amendment, the Fifth Circuit panel wrote

> "Here, as in *Mendenhall*, the DEA agent merely approached Fry and Gadsden, identified himself, and asked if he could speak with them, a request they granted. Thus, following Justices Stewart and Rehnquist, 'on the facts of this case, no "seizure" of the respondent occurred.' " *Id.*

See also, People v. *Guzman*, 108 Cal.App.3d 601, 166 Cal.Rptr. 633 (1980) ("the Fourth Amendment prohibits unreasonable seizures, not eye contacts and greetings.").

This Court understands that our own Circuit has not yet adopted the approach we have just taken, but

absent indication to the contrary, we believe, as do at least two Justices on the Supreme Court, that this approach is in keeping with the letter and the spirit of the Fourth Amendment as well as the holdings of recent Appellate Court decisions. However, because the state of the law is so uncertain and because our Circuit has not yet adopted the approach we have taken, we proceed in the alternative to examine the facts to determine whether or not there were objective and articulable facts upon which the agents could have based a reasonable suspicion that defendant was engaged in illegal activity.[5]

In determining whether the facts and inferences derived therefrom support a reasonable suspicion, we are guided by the three criteria set out by the Second Circuit in *United States* v. *Forero-Rincon*, *supra*, Slip Op. at 221. First, the Dade County detectives' observations must be viewed as a whole, not as discrete and separate facts. Second, the observations must also be viewed through the eyes of an agent who is trained and experienced in discerning in ostensibly innocuous behavior indicia of narcotics trafficking. Third, the fact that conduct is as consistent with innocence as it is with guilt does not preclude that conduct from supporting a reasonable suspicion of criminal activity.

Detective McGavock's suspicion was based upon the following facts:

1. Defendant Place was departing from a "source city."

2. Defendant systematically scanned the immediate area in the lobby in which he was stand-

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[5] Proceeding in the alternative in these types of cases was also adopted recently by the Fifth Circuit. *See United States* v. *Fry*, *supra*.

ing and looked very closely at each person that was seated or standing in that area.

3. Defendant noticed and paid close attention to Mr. McGavock when he left the line.

4. Detective stared directly at the detectives two or three times as the detectives moved around the lobby.

5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby once again.

6. Defendant paid for his ticket in cash.

7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed.

This odd, if not bizarre, behavior, speaks for itself. It is certainly not normal conduct to do what defendant did in the Miami International Airport. And while the behavior itself may not be guilty behavior, the third criteria of the test outlined above indicates that it need not be so.

Viewed as a whole and through the eyes of an experienced agent, we believe that defendant Place's conduct could easily have given rise to a reasonable suspicion that some illegal activity was afoot. Defendant's behavior certainly did serve to make himself distinguishable from the rest of the crowd milling around about at the airport. His behavior was not merely the odd behavior of an eccentric; nor was

it the normal behavior of an every day airline traveler. Furthermore, the recent Supreme Court decision in *Reid* v. *Georgia*, *supra*, does not militate against our finding in this case that there was reasonable suspicion to justify the stop. In that case the only suspicious conduct exhibited by the defendant was that he preceded another person and occasionally looked backward at him as they proceeded through the airport. The Supreme Court held, as a matter of law, that this conduct could not give rise to a reasonable suspicion, characterizing it as "simply too slender a reed to support the seizure in this case." *Id.* 100 S.Ct. at 2754.

In the instant case, we have found at least eight objective and articulable facts upon which a reasonable suspicion could be based. This Court believes that the facts of the case now before us are easily distinguishable from the facts in *Reid* v. *Georgia*; and, as our own Circuit has indicated, "the reasonableness of the agent's suspicion must be judged on particular facts of each case, *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980)." *United States* v. *Forero-Rincon*, *supra*, Slip Op. at 220. Therefore, we hold that the Dade County detectives' suspicion was reasonable because it was based on objective and articulable facts and that the stop, if it can be characterized as such, was therefore valid. *See id.; United States* v. *Vasquez*, *supra; United States* v. *Vasquez-Santiago*, 602 F.2d 1669 (2d Cir. 1979); *United States* v. *Price*, *supra; United States* v. *Rico*, *supra; see also United States* v. *Fry*, *supra; United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980).

Having established the validity of the encounter in Miami International Airport, we now turn to the events which transpired later the same day in La-

Guardia Airport where Special Agents Whitmore and Iglesias awaited defendant's arrival. As the above recitation of facts indicates, these agents observed defendant's behavior before they approached him for questioning. It should also be noted that these agents were in possession of the information communicated to them by the Dade County detectives. That information included not only the observations made prior to the encounter in Miami International Airport but also a report of the defendant's behavior during that encounter, the defendant's parting remarks, the fact that the addresses listed on defendant's baggage were (i) not the same address and (ii) apparently did not exist, and that the callback number was located at even yet a third address.

As to this encounter, we reiterate our conclusion that the Fourth Amendment does not prohibit law enforcement officials from questioning private citizens as long as that private citizen reasonably believes that he is free to end the conversation and leave at any time. Consequently, we believe that Special Agents Whitmore and Iglesias could have approached and questioned defendant even if they did not have a reasonable suspicion that he was engaged in criminal activity. *See United States* v. *Mendenhall, supra* (Stewart, J.).

Nevertheless, this encounter became a stop when Detective Iglesias took possession of defendant's driver's license and when Detective Whitmore took possession of defendant's baggage. While this was not an actual restraining of the person of the defendant, we believe that such conduct on the part of the agents went beyond the mere questioning of a citizen to a type of police action that must be justified by more than a desire to investigate. We will discuss the validity of the detention, *infra*, but for

now, suffice it to say that the detention of the personal belongings of an individual questioned by the police is also a detention of that person. Such conduct, we believe, would lead a reasonable person to believe that he was not free to end the conversation and leave, but rather was being subjected to police domination and subservient thereto. This encounter thus became a stop and must perforce be based upon objective and articulable facts which must have given rise to a reasonable suspicion that defendant was engaged in illegal activity.

As indicated above, there were ample facts upon which a reasonable suspicion could be based to justify the encounter in Miami International Airport. These facts, listed above, were also communicated to Special Agent Whitmore and we shall not reiterate those facts here. We shall list, however, those additional facts which Special Agents Whitmore and Iglesias relied upon in making the stop of defendant in LaGuardia Airport:

1. Defendant Place broke out into a sweat when asked about narcotics by Detective McGavock and Facchiano in Miami International Airport.

2. Defendant Place's parting remark to the same detectives that he had spotted them in the lobby.

3. The discrepancy between the addresses listed on the identification tags attached to defendant's baggage.

4. The fact that neither of those addresses were known to exist.[6]

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[6] It is unclear from the testimony taken at the suppression hearing whether or not Mr. McGavock told Agent Whitmore that the callback number was located at still a third address.

5. Defendant's scanning activity in LaGuardia Airport.

6. Defendant's nervous behavior and conduct in LaGuardia Airport.

7. Defendant's spontaneous remark on being approached by the special agents that "I knew you guys were cops. I spotted him as soon as I got out of the plane." (Tr. 83).

These facts, taken together with those facts communicated to Agent Whitmore by the Dade County authorities, easily support a finding that the stopping of defendant by Special Agents Whitmore and Iglesias was based upon a reasonable suspicion supported by objective and articulable facts. We do not repeat here what we stated above about defendant's behavior. We only note that this is not the conduct of the everyday traveler and that, in fact, the agents would have been remiss had they not investigated this conduct further.

Defendant's third argument in support of the suppression of the evidence obtained by the search of his bags pursuant to the Magistrate's warrant is that the detention of the suitcase by Agent Whitmore violated his Fourth Amendment rights. Defendant contends that such a seizure must take place pursuant to a warrant or upon a showing that probable cause existed at the time of seizure. This question, at least according to our research, is a novel one in our Circuit. However, we have the benefit of a recent Seventh Circuit Court of Appeals opinion which addressed a strikingly similar factual situation.

In *United States* v. *Klein*, *supra*, at 25, the Seventh Circuit held that the mere detention of a person's baggage may be supported by a reasonable sus-

picion that the bags contained contraband. Because it is instructive to do so, we quote from that decision extensively:

> Nevertheless, we are left with the important question whether probable cause was necessary to *detain* the suitcases, given the fact that no probable cause existed at that point to *search* the suitcases. As mentioned above, in *Terry* v. *Ohio*, 392 U.S. 1, [92 S.Ct. 1921] (1968), the Supreme Court sanctioned the detention of individuals for further investigation when a police officer had reasonable suspicion to believe something unlawful was afoot. Our research has uncovered no case in which a court has confronted a detention situation precisely like the one before us now, but the Supreme Court did address an analogous situation in *U.S.* v. *Van Leeuwen*, 397 U.S. 249, [90 S.Ct. 1029, 25 L.Ed.2d 282] (1970), where it extended the *Terry* logic to the detention of parcels of mail believed to contain contraband.
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> In *Van Leeuwen*, a postal clerk received for first-class mailing two packages, each weighing twelve pounds, with one addressed to a post-office box in Van Nuys, California and the other to a post-office box in Nashville, Tennessee. Each package was registered and insured for $10,000 and was to be sent airmail. The postal clerk found all these facts suspicious and voiced his suspicions to a policeman who happened to be present. The policeman then noticed that the return address on each package was that of a vacant housing area and that the person who had mailed the packages was drving a car with Canadian license plates.

Because of these suspicious facts, the police detained the packages pending further investigation. By the next day, there was information sufficient to establish probable cause for issuance of a search warrant; a search warrant was obtained, the packages were opened, inspected, resealed and sent on their way.

Recognizing that the parcels in question were first-class mail and therefore free from postal inspection except in accordance with the Fourth Amendment. 397 U.S. at 251, [90 S.Ct. at 1031], the Court nevertheless held that the detention pending further investigation of the packages in that case was justified:

> The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town certainly justified detention, without a warrant, while an investigation was made. . . . The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically—and it is theory only that respondent has on his side—detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment. Detention for 1½ hours—from 1:30 p.m. to 3 p.m.—for an investigation certainly was not excessive; and at the end of that time probable cause

> existed for believing that the California package was part of an illicit project.

397 U.S. at 252, [90 S.Ct. at 1032].

By the same token, we hold that the detention of the suitcases pending further investigation in this case was not an unreasonable seizure. We are cognizant of the possible difference between the privacy interest in packages surrendered in the mails and that in luggage carried by an individual. However, in this case we believe that defendants' privacy interest in their luggage was adequately protected. In *Arkansas* v. *Sanders*, 442 U.S. 753, [99 S.Ct. 2586, 61 L.Ed.2d 235] (1979), the Supreme Court elaborated on the scope of an individual's privacy interest in his luggage:

> One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. . . . [T]he very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.

442 U.S. at 764, [99 S.Ct. at 2593] [footnote omitted].

In a similar vein, the Court in *Van Leeuwen* recognized the great privacy interest in the contents of first-class mail, stating that " 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' " *Van Leeuwen*, *supra*, 397 U.S. at 251, [90 S.Ct. at 1032], quoting from *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 437, [41 S.Ct. 352, 65 L.Ed. 704] (Holmes, J., dissenting). The Court went on to say that

> [n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

397 U.S. at 253, [90 S.Ct. at 1032]. *By the same token, defendants' privacy interest in the contents of their suitcases in this case "was not disturbed or invaded until the approval of the magistrate was obtained."*

> We hold that at the time they decided to detain the bags while waiting for a canine trained in drug detection, the DEA agents had reasonable suspicion to believe that the bags contained contraband; they would have been remiss in not detaining the bags for further investigation. (Emphasis added).

Id. at 25-26.

We are not faced with a taking into custody of a person which must be supported by probable cause. *See Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). We are not faced with an actual search which also must be based on probable cause. We are faced with a detention of luggage. If detention of a person can be had based on a reasonable suspicion, see *Terry* v. *Ohio*, *supra*, there is no reason why detention of physical items cannot be based on the same standard. Consequently, we agree with the Seventh Circuit's reasoning that detention of the bags in this case need only be based

upon a reasonable suspicion.[7] The facts delineated above, as well as the defendant's behavior during the questioning, were sufficient to raise in the agents mind a reasonable suspicion to believe that the bags contained narcotics. We therefore hold that defendant's Fourth Amendment rights were not violated by the detention of the bags by the DEA agents.

Defendant's final argument in support of his suppression is that his Fourth Amendment rights were violated when his two suitcases were subjected to sniff searches by the police dog named Honey. Defendant does not contest the validity of sniff searches *per se*, but rather asserts that this particular search was "carried out under such circumstances reasonably calculated to achieve a tainted reaction from the dog." We have reviewed the testimony taken at the suppression hearing and find nothing to support defendant's claim. The bags were presented to the dog one at a time, along with twenty or thirty other parcels. The dog gave a positive reaction to the smaller bag and an ambiguous reaction to the larger bag. There is nothing in the record to suggest that the reaction was contrived by the agents or by the dog handler. We therefore deny defendant's motion on this ground.

On th basis of the foregoing, we deny defendant Raymond Place's motion to suppress the evidence seized from him on August 19, 1979.

SO ORDERED.

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[7] Should, however, it be determined that a detention of luggage must be based on probable cause we note here that in our opinion there was probable cause in this case to detain the bags. Because of the Seventh Circuit opinion and our agreement therewith, we need not pass on that question; but were we called upon to do so we would hold that there was.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-642

UNITED STATES, PETITIONER

v.

RAYMOND J. PLACE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of January, 1982.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1835

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. PLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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RAYMOND J. PLACE, PETITIONER

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UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Cross-petitioner contends that he was seized in violation of the Fourth Amendment when he was approached and briefly questioned by narcotics agents.

1. The facts are fully set forth at pages 2-6 of the government's petition in No. 81-1617, in response to which this cross-petition has been filed.[1] Briefly, two narcotics detectives approached cross-petitioner in the Miami International Airport after his suspicious behavior attracted their attention. After the officers asked to see cross-petitioner's identification and airline ticket, cross-petitioner boarded

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[1] In No. 81-1617, the United States contends that the Fourth Amendment does not prohibit police from detaining personal luggage reasonably suspected of containing narcotics for the purpose of arranging exposure to a narcotics detection dog.

his flight to New York. When he deplaned in LaGuardia Airport, he was approached by two federal narcotics agents. Their suspicions were based upon both information related to them by the Miami detectives and their own observations of cross-petitioner's behavior in New York that suggested that he might be carrying drugs. After a short discussion, cross-petitioner was told that he was free to leave, but his luggage was detained and exposed to a narcotics detection dog. The dog reacted positively to the luggage, and the agents thereupon obtained a search warrant. The luggage was found to contain LSD, cocaine, and marijuana.

Cross-petitioner contends that the narcotics agents seized him without reasonable suspicion of criminal activity, thus violating the Fourth Amendment.[2] The district court rejected this contention in denying cross-petitioner's suppression motion, holding that the encounters in both Miami and New York were supported by reasonable suspicion (81-1617 Pet. App. 47a-52a). The district court also held that the reasonable suspicion justified the limited detention of the luggage (*id.* at 52a-57a). The court of appeals did not reach cross-petitioner's contention. The court found it "unnecessary to resolve th[e] issue" and it "assum[ed] that circumstances justifying an investigatory stop existed" because, in its view, the detention of the luggage based on reasonable suspicion violated the Fourth Amendment (*id.* at 13a-14a).

2. Cross-petitioner's fact-bound contention concerning the legality of his encounters with the police does not warrant this Court's review. The contention was not considered by the court of appeals, and there is no reason for this Court to consider it at this time. If the government's petition in No. 81-1617 is denied, or if it is granted and the court of

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[2]Cross-petitioner apparently contends that two separate illegal seizures occurred—one in Miami and one in New York.

appeals' judgment is affirmed, there will never be a need to consider the issue raised by this cross-petition. If the court of appeals' judgment is reversed, that issue will be open for consideration in the first instance by the court of appeals on remand.

3. In any event, cross-petitioner's contention is without merit. First, as we explain in further detail at pages 18-25 of our amicus brief in *Florida* v. *Royer*, cert. granted, No. 80-2146 (Nov. 30, 1981),[3] not every encounter between a law enforcement officer and an individual constitutes a "seizure" within the meaning of the Fourth Amendment. Rather, a Fourth Amendment seizure occurs only when, in view of all the circumstances, a reasonable person would conclude that he was not free to leave. See *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (opinion of Stewart, J.). See also *United States* v. *Berry*, 670 F. 2d 583, 594-595 (5th Cir. Unit B 1982) (en banc); *United States* v. *Harrison*, 667 F. 2d 1158, 1160-1161 (4th Cir. 1982), petition for cert. pending, No. 81-6302; *United States* v. *West*, 651 F. 2d 71, 72-73 (1st Cir. 1981), petition for cert. pending, No. 81-307; *United States* v. *Elmore*, 595 F. 2d 1036, 1041-1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980). It is clear that the officers did not seize cross-petitioner when they approached him in the Miami airport. They addressed cross-petitioner politely, asked only to see his plane ticket and some identification, and then allowed him to board his flight. The district court correctly concluded (81-1617 Pet. App. 45a-46a) that, under these circumstances, a reasonable person would not have believed that he was not free to leave.

Moreover, even assuming arguendo that the Miami airport encounter did constitute a seizure, the officers possessed reasonable suspicion that justified the stop. As the

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[3]A copy of our brief in *Royer* is being furnished to cross-petitioner.

district court found (81-1617 Pet. App. 47a-48a), there were at least eight objective facts observed by the agents, amounting to "odd, if not bizarre, behavior" (*id.* at 48a), that supported a finding of reasonable suspicion. These articulable facts gave the agents justification to conduct a brief investigative stop. See, *e.g.*, *United States* v. *Mendenhall, supra,* 446 U.S. at 561-565 (opinion of Powell, J.); *United States* v. *Nembhard,* No. 81-1125 (6th Cir. Apr. 19, 1982), slip op. 15-19; *United States* v. *Harrison, supra,* 667 F. 2d at 1161.

The same principles apply to the encounter with cross-petitioner in New York. The agents there were aware of the suspicious behavior that had occasioned the police approach in Miami, as well as the additional suspicious information that had come to light during the Miami encounter, and they had observed his suspicious behavior in New York (see 81-1617 Pet. App. 51a-52a). Clearly, they had sufficient grounds for suspicion to warrant a brief investigatory stop.[4]

Contrary to cross-petitioner's suggestion (Pet. 9), it is therefore clear that both the Miami detectives and the DEA agents in New York stopped him not because he merely met a so-called "drug courier profile," but rather because they had reasonable suspicion, based on objective articulable facts, that he was transporting drugs.

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[4]The district court was of the view that the initial approach by the agents was not a seizure but that the encounter became an investigatory stop requiring reasonable suspicion once the agents took possession of cross-petitioner's driver's license and luggage (81-1617 Pet. App. 50a-51a). The court concluded that there was an ample basis for suspicion to justify the stop (*id.* at 51a-52a). Accordingly, irrespective of whether the New York encounter was a seizure, it did not violate the Fourth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982